

A Brief Look at Recess Appointments

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On the morning of August 16, Federal Trade Commission (FTC) Chairman Tim Muris relinquished his position to return to academia and private practice. That same Monday morning, Jones Day partner and former Deputy Assistant Attorney General Deborah Majoras arrived at the FTC to take Muris's place as both Federal Trade Commissioner and Chair. Two weeks later, on August 31, Commissioner Mozelle Thompson left the FTC after nearly seven years of service. He was replaced on September 3 by Jonathan Leibowitz, a lobbyist for the Motion Picture Association of America and a former Senate Judiciary Committee staffer.

Although Majoras and Leibowitz were nominated several months ago by President George W. Bush, those nominations have not yet cleared the U.S. Senate. Instead, President Bush placed Majoras and Leibowitz on the FTC by exercising his power to appoint senior government officials during Senate recesses. With two of the five members of the FTC now serving as "recess" appointees—one of them the new Chair—many in the antitrust bar have been turning to their old constitutional law case books to figure out exactly what recess appointments are. In this article I will attempt to shed some light on the practice.

The Majoras and Leibowitz Nominations

Nominees to the FTC must generally be confirmed by the Senate before being appointed. However, Commissioners Majoras and Leibowitz did not assume their new duties with the blessings of that body, due largely to the parliamentary maneuvers of Senator Ron Wyden (D-OR).

Senator Wyden, a longstanding critic of the FTC's handling of mergers in the petroleum industry, has blamed this year's spike in gasoline prices, in part, on what he has described as the agency's lax oversight. Leibowitz, a Democrat, and Majoras, a Republican, were nominated by President George W. Bush on April 8 and May 11, 2004, respectively. In early summer Senator Wyden said he intended to place a "hold" on both nominations until his concerns about the lack of intense civil antitrust oversight by the FTC were addressed to his satisfaction. Under Senate rules, such a move would have prevented the Senate from debating the nominations once they had cleared the Senate Commerce Committee, which has oversight responsibility for the FTC.

The nominations did not even get that far. Committee Chairman John McCain (R-AZ), who had intended to hold a vote on the nominations early on the morning of July 22, before the Senate broke for its annual August recess, agreed to postpone the committee vote for a few hours as a courtesy to Senator Wyden, who had asked for additional discussion and debate time. When Chairman McCain brought the nominations up for a vote later that day, Senator Wyden invoked the Senate's rarely used "2-hour rule," which can force an end to a committee meeting that has lasted longer than two hours when the Senate is in session. An angry Senator McCain gavelled the committee meeting to a close, and the Senate departed the capital with the Majoras and Leibowitz nominations still on the table.

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Article II of the Constitution authorizes the president to appoint “officers of the United States” with the “Advice and Consent of the Senate,” but it also confers power to the president to fill vacant government posts when the Senate is in recess. The Senate’s inaction left the door open for President Bush to fill the two FTC slots—and eighteen other vacant government positions—by making such “recess appointments.” Although very closely watched by members of the antitrust bar, neither the Majoras/Leibowitz nomination saga nor their respective recess appointments garnered the same degree of press and public interest as similar battles over judicial nominations, such as President Bush’s recess appointment in January 2004 of Charles Pickering to the Fifth Circuit Court of Appeals. However, the power exercised by the president in both situations is the same, and because all recess appointments bypass the Senate’s cherished advice and consent process, so is the potential for controversy.

A Brief History Lesson

The nation’s federal judges, ambassadors, and senior government officials—including Federal Trade Commissioners—may be nominated by the president, but technically they are appointed jointly by the president and the Senate.¹ While the extent of the Senate’s “advice and consent” role is often the subject of heated debate, the question of whether the Framers intended the Senate to play some role in the appointment of judges and senior government officials is not.

However, there is more to Article II than the “Advice and Consent” clause. The next clause states that “[t]he President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.”² What did the Framers have in mind when they committed those words to parchment? Neither the records of the Constitutional Convention nor other sources, such as *The Federalist Papers*, provide much guidance—although the latter do note that the clause “authorize[s] the president, Singly, to make temporary appointments” when “it might be necessary for the public service to fill [vacancies that might happen during the Senate’s recess] without delay,” and that it should be considered a “supplement” to the Appointments Clause.³

This absence of either discussion or debate arguably supports the view that the recess appointment power was intended to be a simple solution to a practical problem, and a power to be exercised only when necessary. The thinking may simply have been that the president should not have to put up with vacancies at the highest levels of government while waiting for the Senate to assemble and consider nominees. Such a rationale may not make much sense in the early 21st century—when the Senate is in session on and off throughout the year, rapid transportation is readily available, and communication instantaneous—but the clause no doubt appeared far more practical in the late 18th century.

When the Constitution was drafted, short legislative sessions and long recesses were expected to be the norm, and even journeys of limited distance were significant undertakings. The early Senate was routinely in recess for most of the year, and its brief sessions were sometimes delayed because travel conditions made it difficult for enough Senators to arrive in the capital to assem-

¹ U.S. CONST. Art. II, § 2, cl. 2 (The president “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court and all other officers of the United States . . .”).

² U.S. CONST. Art. II, § 2, cl. 3.

³ See *Staebler v. Carter*, 464 F. Supp. 585, 596–97 (D.D.C. 1979) (discussing THE FEDERALIST No. 67, at 455 (Alexander Hamilton) (Wesleyan ed. 1961)).

ble a quorum. Although travel conditions improved throughout the 19th century, the country—and the distances that Senators had to travel—continued to expand. Until the early 20th century, moreover, Congress was in recess for about half of every year.

Today, of course, Congress meets for longer periods throughout the year, with shorter recesses, so regardless of the Framers' original intent it would be difficult to argue that presidents make recess appointments primarily because of scheduling concerns, or in emergencies.⁴ However, neither the use of the power for political rather than practical reasons, nor the controversy such appointments can cause, is new. A good example of the latter can be found near the start of the republic.

President George Washington, who made a total of nine judicial recess appointments during his two terms,⁵ caused a political firestorm with his recess appointment of John Rutledge to the Supreme Court. In 1795, when Chief Justice John Jay resigned to become governor of New York, Washington appointed former Associate Justice John Rutledge to fill the vacancy during a Senate recess. The hot political issue of the day was Jay's Treaty of 1794 with Great Britain, which resolved disagreements that had festered since the signing of the Treaty of Paris in 1783. Although the treaty was immensely unpopular with the public, it was ratified by the Senate in June 1795 with the support of the Washington Administration, shortly before the Rutledge recess appointment. Several weeks later, Rutledge gave a speech in which he stated that he would rather see President Washington dead than see him sign the recently ratified treaty. The Washington Administration maintained Rutledge's appointment in the face of the resulting uproar, but the new Chief Justice's views were too much for the Senate, which rejected his permanent appointment in December 1795.

Although recess appointees are rarely so controversial, presidents often use the power to install temporarily nominees who are unable to win Senate approval. For example, a president may fill a vacancy with a recess appointee in order to delay a confirmation vote until after an election, when the nominee will have the advantage of facing a potentially altered political landscape as an incumbent. This may have been the thinking behind President Eisenhower's appointments of Justices William Brennan in October 1956 and Potter Stewart in October 1958. Although a riskier strategy politically for both president and nominee, presidents may also use the recess appointment power to install those who enjoy the support of a majority of the Senate but whose nominations cannot be brought to the floor for a vote because of the parliamentary maneuvers of the opposition. Such maneuvers can run the gamut from large scale filibusters, as in the case of the Pickering nomination, or single-Senator tactics, such as those employed by Senator Wyden to block the Majoras and Leibowitz nominations.

⁴ See, e.g., *Staebler*, 464 F. Supp. at 597 (“[T]here is nothing to suggest that the Recess Appointment Clause was designed as some sort of extraordinary and lesser method of appointment, to be used only in cases of extreme necessity.”).

⁵ SUART BUCK, ET AL., THE FEDERALIST SOCIETY, JUDICIAL RECESS APPOINTMENTS: A SURVEY OF THE ARGUMENTS 8–9 (Jan. 2004) [hereinafter *FS Survey*], available at <http://www.fed-soc.org/pdf/recapp.pdf>. Both the *FS Survey* and a report by the Congressional Research Service, *infra* note 13, provide excellent overviews of the practice and history of judicial recess appointments, including topics not discussed here, such as the potential conflict between the recess appointments clause and section 1 of Article III, as well as the interesting question of whether salaries may be paid to recess appointees. See, e.g., *FS Survey, supra*, at 4–6 (potential Article II/Article III conflict) and 11–12 (payment).

The Recess Appointments Clause

Whatever the Framers' original intent, the recess appointment power today is considered a reasonable and constitutional tool that enables the president to counter undemocratic Senate intransigence or inaction. Or, it has been twisted by unreasonable presidents into a scurrilous means of circumventing the democratic process and the constitutionally appointed advice and consent powers of the Senate. It depends on whom you ask, and when you ask them.

But aside from political considerations, are there limits to the president's recess appointment power? For example, are vacant positions always "Vacancies"; when is a recess "the Recess"; and what exactly does it mean for a vacancy to "happen"? As some law school professors are inclined to say: Let's take a moment to unpack the clause.

"The President shall have the Power to fill up all Vacancies . . ." The last word of that excerpt has occasionally caused problems. What, exactly, is a "vacancy" under the recess appointments clause? If a judge with life tenure resigns or dies while in office, the position becomes a vacancy. Similarly, if a holder of a term position on a regulatory board or commission resigns before or upon the end of a term, the position moves into the "vacancy" column. Those are easy. What if despite the expiration of an incumbent's term the incumbent has not—or will not—go gently into that good night? Must the office be empty, the desk drawers cleared out, the pictures with the powerful taken off the walls, and the farewell cake consumed before the position is truly a "vacancy"? The answer, as perhaps should be expected, is "maybe."

The answer is "maybe" because the statutory language that creates a term position often includes a "hold-over" provision that permits or even requires the outgoing office-holder to remain in the post upon the expiration of a term until a replacement arrives. For example, the Federal Trade Commission Act states that "upon the expiration of his term of office a Commissioner shall continue to serve until his successor shall have been appointed and shall have qualified."⁶

The question of whether a position is truly "vacant" if it remains occupied under a hold-over provision has not been resolved definitively by the courts,⁷ although presidents have long interpreted hold-over provisions as not conflicting with their recess appointment power, and Congress has never objected to the practice.⁸ The limited case law suggests that a president cannot use the recess appointment power to fill a term position if the incumbent's term has not expired, or if the incumbent remains in office pursuant to a mandatory holdover provision, unless the incumbent resigns or is removed.

Why might this be relevant? Majoras was appointed to a position that had been vacated by her predecessor before his term had expired—albeit shortly before she was sworn in. However, it is worth noting that the FTC Act's hold-over provision is mandatory, and that it contains the "appoint-

⁶ 15 U.S.C. § 41(1). The Securities Exchange Act of 1934 is similar. *See* 15 U.S.C. § 78d(a) ("Each [SEC] commissioner shall hold office for a term of five years and until his successor is appointed and has qualified.").

⁷ *Compare* *Wilkinson v. Legal Servs. Corp.*, 865 F. Supp. 891, 906 (D.D.C. 1994), *rev'd on other grounds*, 80 F.3d 535 (D.C. Cir. 1996) ("expiration of a statutory term of office, therefore, does not create a 'vacancy' that requires application of the Recess Appointments Clause" if relevant hold-over provision requires departing official to remain until replaced), *and* *Mackie v. Clinton*, 827 F. Supp. 56 (D.D.C. 1993), *vacated in part as moot*, 1994 WL 163761 (D.C. Cir. 1994) (no vacancy on U.S. Postal Service Board of Governors if holdover provision, which permits a Governor to continue to serve for up to one year after expiration of his term until "his successor has qualified," applies), *with* *Staebler*, 464 F. Supp. 585 (FEC vacancy occurs upon expiration of a Commissioner's term, not when the Commissioner loses the right to remain in office pursuant to Federal Campaign Act's hold-over provision by virtue of the appointment and confirmation of a successor).

⁸ *See* *Staebler*, 464 F. Supp. at 594.

ed and qualified” language that some courts have equated with a requirement that the replacement be confirmed by the Senate.⁹

“that may happen during the Recess of the Senate . . .” Two distinct questions: What exactly does it mean for a vacancy to “happen during [a] Recess,” and when is a recess “the Recess”?

The first question is potentially the more difficult of the two. One could interpret the words “that may happen during the Recess . . .” to reach only vacancies that “happen to occur” during a recess. Under such a reading, the president could only use the recess appointment power to fill positions that become vacant while the Senate is in recess. However, while such a narrow interpretation may be reasonable on its face—especially when one remembers that the early Senate was in recess far more often than it was in session, and that vacancies were therefore far more likely to occur during recesses—it has been rejected by attorneys general since at least 1823, when Attorney General William Wirt advised President Monroe that it should be

perfectly immaterial when the vacancy first arose; for, whether it arose during the session of the Senate, or during their recess, it equally requires to be filled. The constitution does not look to the moment of the origin of the vacancy, but to the state of things at the point of time at which the President is called on to act. Is the Senate in session? Then he must make a nomination to that body. Is it in recess? Then the President must fill the vacancy by a temporary commission.¹⁰

Subsequent attorneys general have agreed with AG Wirt’s opinion in a variety of situations.¹¹

When the Constitution was written—when horse-drawn coaches and mule-pulled barges were state of the art—a president may have had to wait a long time for a quorum of senators to assemble to consider nominations. It seems inconceivable that the Framers would have intended the president’s recess appointment power to apply to vacancies that come about one day into a lengthy Senate recess, but not to those that occur one day prior to the start of the recess. Instead, the consensus view is that the provision applies to all vacancies that “happen to exist” during a Senate recess, i.e., to those that either (a) come about while the Senate is in recess, or (b) existed prior to the recess and were not filled before the Senate left town. This interpretation has been widely accepted by the courts.¹²

On to the second question: Does any break in the Senate’s legislative calendar qualify as “the Recess of the Senate” sufficient to trigger the president’s recess appointment power? Over two centuries of tradition and precedent suggest that the answer is “not quite.”

⁹ Compare *Wilkinson*, 865 F. Supp. at 900 (“The plain meaning of [‘appointed and qualified’] is that [the outgoing Director] remains . . . until the new Director has been ‘appointed’ by the President and ‘qualified,’ i.e., confirmed by the Senate.”), and *Mackie*, 827 F. Supp. at 58 (equating “successor has qualified” with “nominated by the President and confirmed by the Senate”), with *Swan v. Clinton*, 100 F.3d 973, 986 (D.C. Cir. 1996) (taken together, “appointed and qualified” may mean “appointed and confirmed,” but “a more natural reading of ‘qualified’ on its own would have it mean that the requirements for assuming office have been fulfilled, which could be either by nomination with Senate confirmation or by recess appointment.”), and *Nippon Steel Corp. v. United States Int’l Trade Comm’n*, 239 F. Supp. 2d 1367, 1376–81 (C.I.T. 2002) (“appointed and qualified” means either appointed by the President and confirmed by the Senate, or appointed by the President pursuant to the recess appointments clause).

¹⁰ 1 Op. Att’y Gen. 631, 633 (1823).

¹¹ See, e.g., 12 Op. Att’y Gen. 449 (1868) (vacancy occurring during a Senate session but recess appointment to fill it made during a later recess); 41 Op. Att’y Gen. 80 (1960) (same). See also 2 Op. Att’y Gen. 525 (1832) (vacancy occurring during a recess and Senate failing to confirm regular non-recess nomination before next recess); 19 Op. Att’y Gen. 261 (1889) (same).

¹² See, e.g., *United States v. Woodley*, 751 F.2d 1008, 1012 (9th Cir. 1985) (narrow interpretation “would lead to the absurd result that all offices vacant on the day the Senate recesses would have to remain vacant at least until the Senate reconvenes”); *United States v. Allocco*, 305 F.2d 704, 710 (2d Cir. 1962) (“happen” means “‘happen to exist’ because only that definition recognizes the continuing nature of the state of vacancy, and accords with the true purpose of the recess power provision”).

Presidents have long made recess appointments during both “inter-session” (between sessions of a single Congress, or between individual Congresses) and “intra-session” (during a single session of Congress) recesses, although the latter have occasionally been questioned. Intra-session recesses were themselves rare prior to the mid-19th century, when shorter congressional sessions perhaps made them less necessary (and the difficulties of travel perhaps made them less practical). In 1867 Congress broke with this tradition and scheduled two intra-session recesses that lasted from March 30 to July 3, and from July 20 to November 21, during which President Andrew Johnson made fourteen recess appointments. Although eleven other presidents have made nearly three hundred intra-session recess appointments since then, only two—one each by Presidents Warren Harding and Calvin Coolidge—were made prior to the 1940s.¹³ Indeed, in 1901 Attorney General Philander C. Knox—the architect of the *Northern Securities*¹⁴ case (and the subject of a portrait that hangs prominently in the Antitrust Division’s main conference room)—advised President Theodore Roosevelt that an intra-session holiday adjournment was merely a temporary suspension of business and not “the Recess” contemplated by the recess appointments clause.¹⁵

Although Knox’s view was rejected by later attorneys general,¹⁶ the argument that intra-session recess appointments are unconstitutional is still made from time to time. For example, it is a central argument in the amicus brief that Senator Edward Kennedy (D-MA) has filed in support of a challenge to the constitutionality of President Bush’s February 2004 intra-session recess appointment of William Pryor to the Eleventh Circuit Court of Appeals. However, the few courts that have been called upon to examine the question have consistently upheld the legitimacy of intra-session recess appointments.¹⁷

If an intra-session recess is just as good as an inter-session recess, how long must either be for the appropriate exercise of the recess appointment power? Or, to put it another way, how short is too short?

Never one for moving gently when moving aggressively would do just as well, President Theodore Roosevelt once made appointments during an inter-session recess that lasted less than a day. As in so many other areas, however, whether Roosevelt’s actions would be considered aggressive today depends upon whom you ask. The modern consensus is that recesses that are longer than thirty days—such as the August 2004 recess during which both Majoras and Leibowitz were appointed—are clearly sufficient. However, President Bush appointed William Pryor to the Eleventh Circuit during an eleven-day intra-session recess in February 2004, and former Presidents Bush and Clinton filled vacancies during similarly brief recesses (twelve days in the case of former President Bush, ten days for former President Clinton). It is also worth noting that although no president has made a recess appointment during a recess that was shorter than

¹³ CONGRESSIONAL RESEARCH SERVICE, RECESS APPOINTMENTS: FREQUENTLY ASKED QUESTIONS 4 & n.7 (Sept. 10, 2002) [hereinafter *CRS Report*], available at <http://www.senate.gov/reference/resources/pdf/RS21308.pdf>.

¹⁴ *Northern Securities Co. v. United States*, 193 U.S. 197 (1904).

¹⁵ See *FS Survey*, *supra* note 5, at 8–9.

¹⁶ See *id.* at 9 (discussing AG Harry Daugherty’s advice to President Harding, 33 Op. Att’y Gen. 20 (1921) (“The question . . . ‘is whether in a practical sense the Senate is in session so that its advice and consent can be obtained.’”)).

¹⁷ See *Nippon Steel Corp. v. United States Int’l Trade Comm’n*, 239 F. Supp. 2d 1367, 1374 n.13 (C.I.T. 2002) (“The Court is aware that the making of appointments during an intrasession recess is not without controversy. The long history of the practice (since at least 1867) without serious objection by the Senate, however, demonstrates the legitimacy of these appointments.”); *Gould v. United States*, 19 Ct. Cl. 593, 595 (Ct. Cl. 1884) (“We have no doubt that a vacancy occurring while the Senate was thus temporarily adjourned [during an intra-session recesses] could be and was legally filled by appointment of the President alone [pursuant to the recess appointments clause].”).

ten days in over twenty years,¹⁸ the Department of Justice has expressed the opinion that an eighteen-day recess is sufficient,¹⁹ and that any recess longer than three days might be of sufficient duration to trigger the recess appointment power.²⁰

“by granting Commissions which shall expire at the End of their next Session.” The precise meaning of the phrase “End of their [the Senate’s] next Session” is not defined within the recess appointment provision. However, it has long been accepted that a recess appointment made by the President during the first session of a Congress, or between the first and second sessions of a Congress, lasts until the end of that Congress’ second session. Recess appointments made during the second session of a Congress, or between Congresses, expire at the end of the first session of the next Congress. In all such cases, recess appointments terminate when the Senate adjourns *sine die*.²¹ Alternatively, of course, a recess appointment is terminated if and when someone—either the recess appointee or someone else—is nominated by the president, confirmed by the Senate, and formally appointed to fill the position.

For example, the Majoras recess appointment was made during a Senate recess that occurred during the second session of the 108th Congress. Therefore, Chairman Majoras’s “Commission” will expire (a) at the end of the first session of the 109th Congress, in late 2005, (b) when she is re-nominated by the president and confirmed by the Senate, or (c) when someone else is nominated by the president for the position and confirmed by the Senate, whichever comes first. Commissioner Leibowitz, who was appointed during the same recess, faces an identical clock.

Conclusion

The practice of filling vacancies by executive fiat during Senate recesses is often controversial. The degree of controversy, and the political price paid by both president and appointee, are a function of the office that is being filled, the level of Senate support for the appointee, and the reasons behind the failure of the original nomination to clear the Senate. For example, although the recent recess appointments to the FTC may have displeased Senator Wyden, by far the loudest protests result from judicial recess appointments that are made in the face of multi-Senator filibusters—which, perhaps not coincidentally, are increasingly rare. Controversial though it may sometimes be, the president’s power under Article II to fill vacancies during Senate recesses is unquestionably constitutional, and its use for both practical and political reasons is as old as the republic itself. ●

¹⁸ See *CRS Report*, *supra* note 13, at 4.

¹⁹ See *FS Survey*, *supra* note 5, at 10 (citing *Recess Appointments During an Intrasession Recess*, 16 Op. OLC 15 (Jan. 14, 1992) (noting appointments that were made by Presidents Reagan and Coolidge during eighteen- and fifteen-day intrasession recesses, respectively)).

²⁰ See *CRS Report*, *supra* note 13, at 3 (citing *Mackie v. Clinton*, Civil Action 93-0032-LFO (July 2, 1993)).

²¹ See *Recess Appointments*, 41 Op. Att’y Gen. 463 (1960) (noting that the commissions of officers appointed during a Senate recess “will continue until the end of that session of the Senate which follows the final adjournment *sine die* of the second session of the 86th Congress”); *Authority of the Attorney General to Make Successive Designations of Interim United States Marshals*, 17 Op. O.L.C. 1 n.3 (Jan. 19, 1993) (the “next Session” language in the Recess Appointments Clause refers to “the adjournment *sine die* of the session of the Senate for the first session of Congress that begins after the designation was made”); *Recess Appointments Issues*, 6 Op. O.L.C. 585, 586–87 (Oct. 25, 1982) (“a recess appointment made during an intrasession recess expires upon the adjournment *sine die* of the session of Congress which follows the adjournment *sine die* of the session during which the intrasession recess occurs.”). See also *CRS Report*, *supra* note 13, at 2.